

**STATE OF HAWAII**  
**Department of Land and Natural Resources**  
**Office of Conservation and Coastal Lands**  
Honolulu, Hawai'i

July 14, 2006

FILE NO.: HA-3269  
New 180-Day Exp.: November 5, 2006

**Board of Land and  
Natural Resources**  
State of Hawai'i  
Honolulu, Hawai'i

**REGARDING:** Request to Extend the Processing Period in Order to Process a Contested Case Hearing for Conservation District Use Application (CDUA) HA-3269 for the Cohen Single Family Residence (SFR)

**APPLICANT:** Jonathan Cohen,  
c/o Randy Vitousek, Esq., Cades Schutte LLP,  
75-170 Hualalai Road, Suite 303, Kailua Kona, HI 96740

**LANDOWNER:** Aloha Properties, LLC

**LOCATION:** Pao'o, North Kohala, Island of Hawai'i

**TMK:** (3) 5-7-001:005

**AREA OF PARCEL:**      ≈10.61 acres

**USE:** ≈ 5,000 square feet (ft<sup>2</sup>)

**SUBZONE:** Resource

**BACKGROUND:**

On April 19, 2006, Roy A Vitousek, III, Esq., acting on behalf of applicant Jonathan Cohen, requested a Contested Case hearing to challenge the Office of Conservation and Coastal Land's recommendation to deny Mr. Cohen's Conservation District Use

Application (CDUA) HA-3269 to construct a single family residence at the above mentioned parcel in Pao'o, North Kohala, Hawai'i. At the same time Mr. Vitousek requested that the processing period for the application be extended (**Exhibit 1**).

#### **TIME EXTENSION REQUEST:**

On April 20, 2006, the OCCL notified Mr. Vitousek that the processing deadline for the application had been extended to August 7, 2006. On May 12, 2006, the OCCL notified Mr. Vitousek that the contested case process was unlikely to be completed by August 7, 2006, and requested a second extension (**Exhibits 2 & 3**).

On May 17, 2006, Mr. Vitousek wrote that his client was "not inclined to request a further extension at this time. Applicant prefers that the Contested Case Hearing process be initiated and progressing so as to have more accurate information as to the likelihood of it being completed by August 7, 2006, before requesting any further extensions" (**Exhibit 4**).

On June 2006, the OCCL faxed Mr. Vitousek a letter, and followed it up with a mailed hard-copy, alerting him that the Pre-hearing Conference and Hearing on Standing had been set for July 24, 2006. A request was made again that he file for an extension to the case. **OCCL notified Mr. Vitousek that OCCL needed to receive the request by the end of the week of June 26, 2006, and early in the week of July 3, 2006 at the latest. (Exhibit 5).**

OCCL staff followed this up with two phone calls to Mr. Vitousek's office the same week. OCCL did not receive any response from Mr. Vitousek.

On June 5, 2006, staff called Mr. Vitousek at his office and again requested that he file for an extension. Mr. Vitousek stated three reasons for not filing: 1) that nothing had been done on the case during the previous extension; 2) that he wanted to know why there was such a delay in processing the contested case hearing; and 3) that he wanted to know the consequences of not filing for an extension before filing.

OCCL staff replied that the case was moving forward in a timely manner and following the process as required by law; that there have been no delays in the process; and that staff did not know what the consequences of not filing would be. OCCL staff requested that Mr. Vitousek make a formal, written request to clarify his concerns and/or comments.

At 4:05 pm on July 6, 2006 OCCL received a fax from Mr. Vitousek requesting a ninety-day time extension on the CDUA process.

#### **AUTHORITY FOR GRANTING EXTENSIONS:**

The authority for granting time extensions to the CDUA processing period is provided in Section 183C-6(b), HRS, which states that "...when a contested case hearing is required

pursuant to Chapter 91, the one-hundred eighty days may be extended an additional ninety days at the request of the applicant. Any request for additional extensions shall be subject to the approval of the Board."

**DISCUSSION:**

Mr. Vitousek's request to extend the processing period an additional 90 days would make the new deadline November 5, 2006. OCCL staff notes the Pre-Hearing and the Hearing on Standing for the Contested Case is set for July 24, 2006. After this the contested case process will involve a set time to allow for pre-hearing motions, an exchange of witness lists and exhibits, the evidentiary hearing, a draft Finding of Fact (FOF), Conclusions of Law (COL), and Decisions and Order (D&O) by the Hearing Officer, a period for intervenors to file exceptions to these, and the final recommended FOF/COL/D&O by the Hearing Officer. Given the number of parties that have applied to be intervenors in this case, OCCL believes that November 5, 2006 remains a difficult if impossible to meet deadline.

Staff, therefore, recommends as follows:

**RECOMMENDATION:**

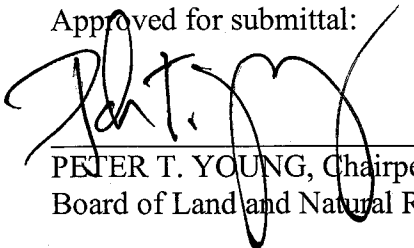
That the Board of Land and Natural Resources grant Mr. Vitousek's request to extend the processing period on CDUA HA-3269 90 days – bringing the deadline to November 5, 2006.

Respectfully submitted,



Michael Cain  
Staff Planner

Approved for submittal:



PETER T. YOUNG, Chairperson  
Board of Land and Natural Resources

cades schutte

55304

April 19, 2006

**Roy A. Vitousek III**  
Direct Line: (808) 329-5811  
Direct Fax: (808) 326-1175  
E-mail: rvitousek@cales.com

Peter T. Young, Chairperson  
Department of Land and Natural Resources  
P.O. Box 621  
Honolulu, Hawaii 96809

Re: REQUEST FOR CONTESTED CASE HEARING  
Petitioner: Jonathan Cohen  
Re: Departmental Recommendation to Deny Conservation District Use  
Application HA-3269  
TMK: (3) 5-7-001:005  
Applicant: Jonathan Cohen, Aloha Properties, LLC

Dear Mr. Young:

It is with considerable regret that we must make, on behalf of the above-identified Applicant, a request for a contested case hearing with respect to the above-referenced matter. This request is made pursuant to Hawai'i Administrative Rules (HAR) §13-1-29 and Hawai'i Revised Statutes (HRS) Chapter 91. The Cohen family has made every effort to meet all requirements of statutes and rules and to meet with, listen to, and gain the support of lineal descendants of Pao'o, as well as surfers, trail uses and other and to propose a single family residence which the people who have been actively involved in the process support and which does not adversely effect the natural or cultural environment of Pao'o.

1. The proceedings herein are under the authority of HRS Chapter 91, 205A, and HAR §13-1-28 *et seq.*
2. Applicant is the owner of property identified as Tax Map Key (3) 5-7-001:005.
3. Applicant has been informed that the Department has made a recommendation to the Board that the CDUA for a single family residence on his property be denied.

**EXHIBIT I**

C S

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Tel: 808.329-5811  
Fax: 808.326-1175

Peter T. Young, Chairperson

April 18, 2006

Page 2

The Staff Report is incomplete, inaccurate and, unfortunately, demonstrates a significant bias on the part of OCCL Staff. Applicant here has met all procedural requirements and demonstrated that the proposed residence meets all criteria for approval pursuant to HAR 13-5-30(c)<sup>1</sup>.

4. Applicant has participated in the public processes for shoreline certification, conservation district use application, environment assessment, trail delineation, Hawaii Island Burial Council, historic preservation and a public hearing with respect to this CDUP in good faith and in a thoughtful, thorough, and conscientious manner, including extensive consultation with the community.

During the public comment period which ended January 17, 2006, and at the public hearing on January 24, 2006, all public testimony was in support of the proposed residence. The Department made a Finding of No Significant Impact (FONSI), published in The Environmental Notice on March 8, 2006. The challenge period ended on April 7, 2006, without, to Applicant's knowledge, any challenge being filed. The Hawaii Island Burial Council has approved a burial treatment plan after input from the lineal descendants of people buried near the property. No timely comments were received from State Historic Preservation Division.

Despite this positive input to the CDUA review process, and despite the applicant's demonstration that his proposed residence satisfies all criteria in HAR 13-5-30(c), we have been advised that OCCL staff recommend denial of this permit application. Staff Planner Tiger Mills advised the Applicant's representatives that she just "didn't like the project" and OCCL Administrator Sam Lemmo said that he "would not give a favorable recommendation unless everyone was in agreement." Staff planners solicited input from community members and agencies after the close of the comment period and gave the applicant inadequate time to respond to these comments before preparing a negative recommendation.

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<sup>1</sup> The criteria in HAR 13-5-30(c) are as follows: (1) The proposed land use is consistent with the purpose of the conservation district; (2) The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur; (3) The proposed land use complies with provisions and guidelines contained in HRS 205A, where applicable; (4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region; (5) The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels; (6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable; (7) Subdivision of the land will not be utilized to increase the intensity of land uses in the conservation district; and (8) The proposed land use will not be materially detrimental to the public health, safety, and welfare.

Peter T. Young, Chairperson

April 18, 2006

Page 3

The Staff Report does not accurately portray the public hearing held pursuant to notice in South Kohala, Hawaii and that members of the public including surfers, fishermen, native Hawaiian cultural practitioners, and lineal descendants of Native Hawaiian with direct connections to Pao'o who testified at the public hearing all testified in favor of the proposed home. The report fails to include or minimizes the many instances of favorable information and /or testimony received by the DLNR and does not accurately describe the late opposition provided in response to Staff requests for comments.

This request for a contested case hearing is made to further identify the facts, issues, and actions taken by the department surrounding this application and in order for the Applicant to be fairly heard with respect to use of his property.

5. Applicant requests that the Conservation District Use Permit be granted.

Applicant would have preferred to make a voluntary request for an extension of the 180-day decision period, but was advised by OCCL Staff that no such request could be approved unless there was a request for a contested case hearing and the Applicant requested the extension. Consequently, this request for a contested case hearing is made and the Applicant requests, pursuant to HAR 13-5-31(d)<sup>2</sup>, that the Board extend the 180-day deadline for the Department, Board or Chairperson to render a decision with respect to the CDUA.

Applicant has recently received information regarding archaeological Site 2383 and wishes to have this issue addressed by appropriate agencies and the lineal descendants.

The Applicant requests that the Department appoint counsel so that ongoing communications can take place.

If your counsel has any questions or requires additional information, please call me at 808-329-5811.

Very truly yours,



Roy A. Vitousek III

for

CADES SCHUTTE

A Limited Liability Law Partnership

<sup>2</sup> HAR 13-5-31(d) states: If within one hundred and eighty days, or a time period as provided by law, after the department's acceptance of a completed application, the department, the chairperson, or the board shall fail to render a decision thereon, the landowner may automatically put the land to the use or uses requested in the application, subject, however, to the conditions contained in 13-5-42 [standard conditions].

LINDA LINGLE  
GOVERNOR OF HAWAII



**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**OFFICE OF CONSERVATION AND COASTAL LANDS**  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

PETER T. YOUNG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
DEPUTY DIRECTOR - LAND

DEAN NAKANO  
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

REF:OCCL:TM

CDUA: HA-3269

Roy A. Vitousek III  
Cades Schutte  
75-170 Hualalai Road, Suite 303  
Kailua Kona, Hawaii 96740

APR 20 2006

Dear Mr. Vitousek,

**SUBJECT:** Request for an Extension of the Processing Period for Conservation District Use Application (CDUA) HA-3269 for a Single Family Residence (SFR) Located at Pao'o, North Kohala, Island of Hawaii, TMK (3) 5-7-001:005

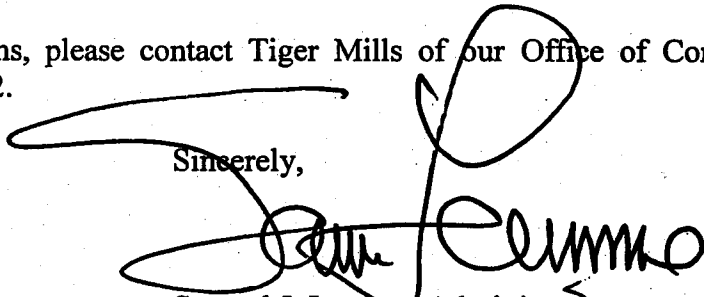
The Department is in receipt of your request for an extension of the processing period for your client's CDUA that was included with your petition, contesting in part, Staff's recommendation to deny your client, Jonathan Cohen's CDUA HA-3269 for a Single Family Residence.

Pursuant to Section 183C-6(b), Hawaii Revised Statutes, the 180-day processing period may be extended an additional 90 days at the request of an applicant when a contested case hearing is requested pursuant to Chapter 91, such as in your case. Any requests for additional extensions shall be subject to the approval of the Board of Land and Natural Resources.

**Therefore, the extended expiration date for your CDUA is now August 7, 2006.**

Should you have any questions, please contact Tiger Mills of our Office of Conservation and Coastal Lands staff at 587-0382.

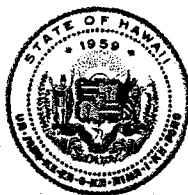
Sincerely,

  
Samuel J. Lemmo, Administrator  
Office of Conservation and Coastal Lands

cc: Chairperson  
Hawaii Board Member  
HDLO

**EXHIBIT 2**

LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

PETER T. YOUNG  
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HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

Ref.: OCCL:MC

File: CC HA-06-03

MAY 12 2006

Roy A. Vitousek III  
Cades Schutte  
75-170 Hualalai Road, Suite 303  
Kailua Kona HI 96740

Dear Mr. Vitousek,

SUBJECT: Extension of Processing Period for Conservation District Use Application [CDUA] HA-3269  
for a Single Family Residence at Pao'o, North Kohala, Hawai'i, TMK (3) 5-7-001:005

The current expiration date for processing CDUA HA-3269 is August 7, 2006. The Contested Case hearings on this CDUA are unlikely to be completed by that date, OCCL requests that you submit a request for an additional extension that OCCL will then submit to the Board.

If you have questions regarding procedures, please contact Michael Cain at 587-0380.

Sincerely,

A large, stylized handwritten signature in black ink, which appears to read "Samuel J. Lemmo".

Samuel J. Lemmo, Senior Planner  
Office of Conservation and Coastal Lands

cc: BLNR Chair  
Linda Chow, Deputy Attorney General

EXHIBIT 3



May 17, 2006

**Roy A. Vitousek III**  
Direct Line: (808) 329-5811  
Direct Fax: (808) 326-1175  
E-mail: [rvitousek@cades.com](mailto:rvitousek@cades.com)

Samuel J. Lemmo, Administrator  
Office of Conservation and Coastal Lands  
Department of Land and Natural Resources  
P. O. Box 621  
Honolulu, Hawaii 96809

Re: Conservation District Use Application HA-3269  
TMK: (3) 5-7-001:005  
Applicant: Jonathan Cohen, Aloha Properties, LLC

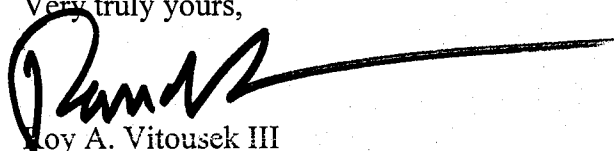
Dear Mr. Lemmo:

Thank you for your letter of May 12, 2006.

My client is not inclined to request a further extension at this time. Applicant prefers that the Contested Case Hearing process be initiated and progressing so as to have more accurate information as to the likelihood of it being completed by August 7, 2006, before requesting any further extensions.

Please call me if you have questions or wish to discuss this matter.

Very truly yours,



Roy A. Vitousek III  
for  
CADES SCHUTTE  
A Limited Liability Law Partnership

RAV:bah

cc: Jonathan Cohen  
Mooers Enterprises, LLC  
Geometrician Associates, LLC

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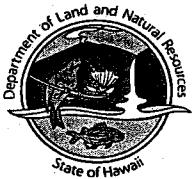
EXHIBIT 4

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LINDA LINGLE  
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LAND  
STATE PARKS

Ref.: OCCL:MC

File: CC HA-06-03

Roy A. Vitousek, III, Esq.  
Cades Schutte LLP  
75-170 Hualalai Road, Suite 303  
Kailua Kona HI 96740

JUN 28 2006

Dear Mr. Vitousek,

**SUBJECT:** Extension of Processing Period for Conservation District Use Application [CDUA] HA-3269  
for a Single Family Residence at Pao'o, North Kohala, Hawai'i, TMK (3) 5-7-001:005

The Office of Conservation and Coastal Lands [OCCL] requests that you submit a request for an additional extension of the processing period for your client's CDUA.

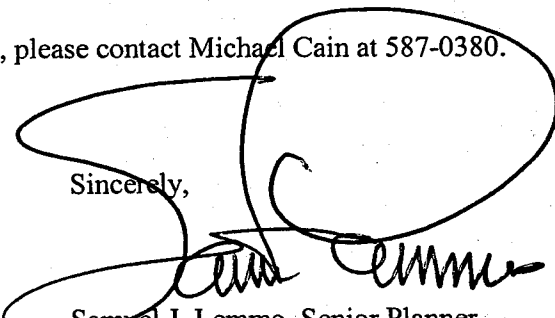
We have set the date for the Hearing on Standing and Pre-Hearing Conference for July 24<sup>th</sup>, 2006 at the Natural Energy Laboratory of Hawai'i Authority in Kailua-Kona [your office should be receiving the Minute Order announcing this later this week].

The current expiration date for processing CDUA HA-3269 is August 7, 2006. The Contested Case Hearings will not be finished by this date. OCCL would like to present your request for a second extension at the next Board of Land and Natural Resources meeting on July 14<sup>th</sup>, meaning that we will need to begin processing the request at the end of this week, or early next week at the latest.

I will fax you a copy of this letter, and follow it up with a hard copy in the mail.

If you have questions regarding procedures, please contact Michael Cain at 587-0380.

Sincerely,

  
Samuel J. Lemmo, Senior Planner  
Office of Conservation and Coastal Lands

cc: ✓ BLNR Chair  
✓ Linda Chow, Deputy Attorney General  
✓ Lou Chang, Hearing Officer

EXHIBIT 5

cades - schutte

a limited liability law partnership

## Facsimile Cover Sheet

DATE : July 6, 2006

TO	Name	Fax No.	Phone No.
	Peter Young, Chairperson Board of Land and Natural Resources ATTN: Jeannie Fujikawa	808-587-0390	808-587-0400
	Sam Lemmo, Senior Planner Office of Conservation and Coastal Lands	808-587-0390	808-587-0382

FROM : Name: Roy A. Vitousek III  
Fax Number: (808) 326-1175  
Phone Number: (808) 329-5811  
E-mail Address: rvitousek@cales.com

RE : Subject: Conservation District Use Application HA-3269  
Contested Case HA-06-03  
TMK: (3) 5-7-001: 005

File No.:

Pages: 3

Transmitting: 7/6/06 Letter

Remarks:

If all pages are not received, please call Terrie at 808-329-5811.

THIS MESSAGE IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via the U.S. Postal service. Thank you.

EXHIBIT 6

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C S

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ca des schutte

July 6, 2006

**Roy A. Vitousek III**  
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Direct Fax: (808) 326-1175  
E-mail: rvitousek@ca des.com

Peter T. Young, Chairperson  
Board of Land and Natural Resources  
State of Hawaii  
P.O. Box 621  
Honolulu, Hawaii 96809

Sam Lemmo, Senior Planner  
Office of Conservation and Coastal Lands  
Department of Land and Natural Resources  
State of Hawaii  
P.O. Box 621  
Honolulu, Hawaii 96809

Re: Conservation District Use Application HA-3269  
Contested Case HA-06-03  
TMK (3) 5-7-001:005

Dear Mr. Young and Mr. Lemmo:

The purpose of this letter is to request a 90-day extension of the decision period with respect to the above-referenced contested case hearing. This request is being made on behalf of the Applicant.

We have been advised by Sam Lemmo of the Office of Conservation and Coastal Lands that if the Applicant does not request an extension of time, the matter will be placed on the Board's agenda with a recommendation that the application be denied. We do not see how the Board could properly act on an application without conducting a contested case hearing once the Board has decided a proper request has been made. This seems inconsistent with the statutes, rules, and requirements of due process.

This issue comes up because of the failure of the department to conduct the contested case hearing in a timely manner. About 90 days have passed since the request for a contested case hearing was made, and very little has been accomplished. The time limits on Board action set out by statute exist to protect applicants from precisely this type of delay. To threaten

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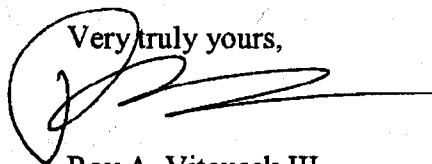
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Peter T. Young, Chairperson  
Sam Lemmo, Senior Planner  
July 6, 2006  
Page 2

applicants with denial of the permit if they do not request an extension of the time period is to make a mockery of the statutory mandate that the department act in a timely manner.

This request to extend is being made under duress because of Mr. Lemmo's threat that the department would ask the Board to deny the application without a contested case hearing.

Very truly yours,



Roy A. Vitousek III  
for  
CADES SCHUTTE  
A Limited Liability Law Partnership

RAV:tmt

cc: Lou Chang, Hearing Officer  
David Kimo Frankel (attorney for intervenor Maika'i Kamakani 'O Kohala Incorporated)  
Mark Grandoni (representative for intervenor Kamakani 'O Kohala Ohana)  
Linda Chow, Deputy Attorney General

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